In the Supreme Court of the United States

OCTOBER TERM, 1918

United States Fidelity & Guaranty Company,
Plaintiff in Error,
vs.
State of Oklahoma et al.,
Defendants in Error.

No. 308

REPLY BRIEF OF PLAINTIFF IN ERROR

FIRST.

The defendant in error raises the question of the jurisdiction of this Court, contending that the case should be here by *certiorari* and not by writ of error. The case is properly here by writ of error because it involves the validity of legislation of the State of Oklahoma alleged by the plaintiff in error to impair the obligation of its contract. Counsel for defendant in error concede that this question is properly reviewable on writ of error,

but say that as the Act of March 6th, 1913, was not the basis of the Court's opinion, its validity is not a question in the case. This assumes a decision adverse to the plaintiff in error and the assumption, instead of involving the question of jurisdiction, involves the decision of a question over which the Court confessedly has jurisdiction.

As the case, on the constitutional question stated, is properly here on writ of error, the Court will determine all the questions involved.

Horner v. *United States* No. 2, 143 U. S. 570.
Penn Mutual Life Insurance Company v. *Austin*, 168 U. S. 685-695.
Fields v. *Barber Asphalt Paving Company*, 194 U. S. 618-620.

SECOND.

In our brief (pages 19 to 39) we discuss the construction of the statutes involved making the argument that they were unreasonably construed by the Supreme Court. Counsel for defendants in error reply to this argument on pages 5 to 17 of their brief. In this reply they make two points: First, that the deposit involved is not an ordinary deposit subject to check, but a special statutory deposit; and, second, that consequently Section 323

gives to the State a lien for the benefit of the guaranty fund which is superior to the right of this deposit to participate either in the assets of the bank or in the guaranty fund.

It will be observed that the vital point of difference between our argument and theirs relates to the nature of the deposit. Their second proposition just stated grows out of their first. They do not contend that the State would have a lien for the benefit of the guaranty fund prior to the right of a general depositor to participate, but base their second argument upon the promise that the deposit involved is not an ordinary deposit, but is a special deposit.

Therefore, if this Court holds that the deposit involved is a general deposit and not a special deposit, the argument of the defendants in error is undermined. We are glad to have the issue thus limited and defined. The deposit involved was a deposit subject to check. That appears from the language of the bond itself. It was a deposit of money and not of some particular property to be returned in kind. This being true, it was an ordinary deposit subject to check and not a special deposit either statutory or otherwise. Neither Section 323 nor 7943 uses the term "special de-

posit." The language of both sections plainly implies deposits in the ordinary course of business. Such deposits are general deposits and not special deposits. This is made clear by the decisions of this Court in

Marine Bank v. *Fulton Bank*, 2 Wallace 252, and
Bank of the Republic v. *Millard*, 10 Wallace 152.

In the first named case, at page 256, this Court says:

> "All deposits made with bankers may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit of money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker; and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand. *The case before us is not of the former class. It must be of the latter.* The parties seem to have taken this view of it, as is shown by the reply made by the Chicago bank, May 1st and 6th, to the New York bank, when inquiring how the account stood."

In the second case, at page 155, this Court says:

"It is no longer an open question in this Court, since the decision in the cases of *The Marine Bank* v. *The Fulton Bank* and of *Thompson* v. *Riggs*, that the relation of banker and customer, in their pecuniary dealings, is that of debtor and creditor. It is an important part of the business of banking to receive deposits, but when they are received, unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall from time to time draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it. This subject was fully discussed by Lords Cottenham, Brougham, Lyndhurst, and Camphill, in the House of Lords, in the case of *Foley* v. *Hill*, and they all concurred in the opinion that the relation between a banker and customer, who pays money into the bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor, and does not partake of a fiduciary character, and the great weight of American authority is to the same effect."

And again, at page 158, this Court says:

"It is hardly necessary to say that the check in question having been drawn on a public depository, by an officer of the government, in favor of a public creditor, cannot change the rights of the parties to this suit. The check was commercial paper, and subject to the laws which govern such paper, and it can make no

difference whether the parties to it are private persons or public agents.

"As soon as the deposit was made to the credit of Lawler as paymaster, the bank was authorized to deal with it as its own, and became answerable to Lawler for the debt in the same manner that it would have been had the deposit been placed to his personal credit."

The rule in Oklahoma is the same. In *Bank of Blackwell* v. *Dean*, 9th Okla. 626, it is held in the syllabus:

"Banks—Deposits in—Special and General. Deposits of money in a bank are either general or special. A general deposit is one which is to be repaid on demand in money, and the title to the money deposited passes to the bank. A special deposit is one in which the depositor is entitled to the return of the identical thing deposited, and the title remains in the depositor.

"Same — Presumption — Burden of Proof. Deposits of money made in a bank in the ordinary course of business are presumed to be general, and the burden of proof is on the depositor to overcome such presumption by showing that the deposit was made under such stipulations or directions as to constitute it a special deposit."

This deposit, therefore, being an ordinary de-deposit subject to check, and not a special deposit, it follows that our interpretation of the statute is

right and that the argument of the defendants in error is unsound.

The fact that this deposit was of public funds and made pursuant to statute does not alter the nature of the deposit, change the relation of debtor and creditor which exists between a bank and its customers, or make it a special deposit as distinguished from a general deposit.

Bank of the Republic v. *Millard, supra.*
McCann v. *Randall,* 147 Mass. 81.

We also call attention to the fact that the entire argument of the defendant in error on this proposition is based on the point which we have just discussed. They do not express any different views on the other positions taken in our brief.

THIRD.

Pages 17 to 25 of the brief of defendants in error are devoted to an effort to show that the Supreme Court rendered its decision without reference to the Act of March 6. 1913. and that therefore that act does not impair the obligation of the contract. Our argument on this point (pages 39 to 51 of the brief) contains an express admission that the Court did not refer to the Act of 1913. It was,

therefore, not necessary for the defendants in error to devote so much space to showing that the act was not referred to. We showed in our brief, however, that the omission of the Court to refer to the act was not conclusive that the act did not influence the decision.

On the other hand, if a proper construction of the statutes in force when the bond was executed leads to the conclusion that this deposit was a general deposit and therefore entitled to participate in the assets of the bank and the guaranty fund, it necessarily follows that the subsequent Act of March 6, 1913, altering that right must have been the basis of the Court's decision and therefore that that act impairs the obligation of the contract.

As we understand, this is the effect of the decisions of this Court cited in our original brief. The omission of the State Court to mention the statute does not alter the fact that the statute exists, and if the State Court misconstrued the previous statutes, this error cannot take from the plaintiff in error his contract right under a correct interpretation of the statutes.

To state the proposition differently, we understand the law to be this: This Court will always

determine for itself the contract rights of a party who claims that the obligation of his contract has been impaired. The contract in this case involves the interpretation of Sections 323 and 7943 of the Compiled Laws of 1909 and Sections 1061 and 1062 of the Revised Laws of 1910. These were the statutes in force when the contract was made. If this Court itself reaches the conclusion that by the contract this deposit was entitled to participate in the assets of the bank and in the guaranty fund (ratably with the guaranty company) and that this right was impaired by the Act of March 6, 1913, the failure of the State Court to mention that act and the fact that it bases its decision upon an interpretation of the other statutes, does not alter the contract itself or prevent this Court from construing the contract in order to ascertain whether its obligation has been impaired. If the contract is as we contend it is, it necessarily follows that the Act of March 6, 1913, undertakes to impair its obligation and is therefore void.

FOURTH.

The remaining argument of the defendants in error, pages 25 to 34 of their brief, it seems to us, is based upon a misconception of our position. We have not contended that statutes might not have

been framed so as to mean what the Supreme Court in this case has held. What we have contended is that the statutes as framed do not mean what that Court has held, and that consequently the contract between the parties is impaired by the subsequent act of the legislature and that the construction by the Court of the statutes is so unreasonable as to impose an unforseen obligation and therefore a deprivation of property without due process of law.

C. B. AMES,
Attorney for Plaintiff in Error.

AMES, CHAMBERS, LOWE & RICHARDSON,
Of Counsel.